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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 50

UNITED STATES OF AMERICA,
Petitioner,

v.

DANIEL ANDREW SEEGER,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Archer, "Faiths Men Live By" (1958), Ronald Press.. 22, 53

Cahn, "Government and Prayer", N. Y. Law Rev., Vol. 37, No. 6, pp. 981, 993-4 (Dec. 1962) 47

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Ducasse, "A Philosophical Scrutiny of Religion" (1953), Ronald Press 53, 54

Encyclopedia Britannica (1957 ed.) Vols. 4, 21 22

Encyclopedia of the Social Sciences, Vol. II 22

Everett, "Religion in Human Experience" (1950) Holt 53

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Friess and Schneider, "Religion in Various Cultures" (1932), Holt 53

Hocking, William E., "Living Religions and a World Faith" (1939) 53

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Hutchinson, David, "The Foundation of the Constitution", pp. 280-281 41

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Rosten, "Religions in America" (1955) Simon & Shuster 53

Russell, "Development of Conscientious Objector Recognition in the United States", 20 Geo. Wash. L. Rev. 409 (1952) 56, 57, 58, 59

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Smith, Homer W., "Man and His Gods" (1952), Little Brown & Co. 53

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White, Andrew D., "Warfare of Science with Theology in Christendom" (1894), 2 Volumes, Macmillan 53

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DANIEL ANDREW SEEGER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Constitutional Provisions and Statute Involved

U. S. Constitution, Amendment I, provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

U. S. Constitution, Amendment V, provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

Section 6(j) of the Universal Military Training and Service Act (Title 50, U.S.C.A., App. §456(j)), provides in pertinent part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. • • •"

Questions Presented

1. Is Section 6(j) of the Universal Military Training and Service Act (50 U.S.C.A., App. §456(j)), as amended by Congress in 1948 by the insertion of the "Supreme Being" provision, invalid, as in violation of the "Establishment of Religion" and "Free Exercise of Religion" clauses of the First Amendment of the United States Constitution and, also, of the "Due Process" clause of the Fifth Amendment thereof?

2. Whether, in granting an exemption from combatant training and service in the armed forces of the United States to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form", Congress, constitutionally, could further require, as a condition and in limitation of such exemption, that such person's religious training and belief in this connection means a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation • • •"?

3. Was not the decision and judgment of the Court of Appeals herein correct in reversing the judgment of the District Court, and in deciding that Section 6(j) of the Universal Military Training and Service Act (50 U.S.C.A., App. §456(j)) violates the First and Fifth Amendments of the United States Constitution, that respondent was improperly convicted of violating said Act and that respondent is entitled to exemption as a conscientious objector under said Section 6(j)?

Respondent denies that the "Question Presented" herein is as stated on page 2 of the Government's brief; and points out that this statement differs materially from the "Question Presented" as stated on page 2 of the Government's petition for a writ of certiorari herein.

Furthermore, respondent denies that the question involved is that stated on page 22 of the Government's brief, as follows:

> "Thus, the Court had presented to it the exact question involved in this case—whether granting an exemption to persons who will not participate in war because of religious convictions, while failing to grant one to non-religious conscientious objectors violates the First Amendment."

The question in this case is not as between a "religious conscientious objector" and a "non-religious objector". Nor is it confined to a claimed violation of the First Amendment, but, rather involves, also, a claimed violation of the Fifth Amendment.

The Government has *conceded* throughout the proceedings below that Seeger is a "religious" conscientious objector; or, stated otherwise, that Seeger is conscientiously opposed to participation in war in any form by reason of religious training and belief. Admittedly, Seeger's religious training and belief, on which his con-

scientious objection is predicated, is not a belief in relation to a Supreme Being. Because of his conviction that the existence of God, or a Supreme Being, cannot be proven or disproven, he could not, affirmatively or categorically, answer the question as to whether or not he believed in a Supreme Being and, accordingly, he was denied exemption.

Thus, the question in this case concerns the authority of Congress to grant an exemption to a religious conscientious objector whose religious belief is in relation to a Supreme Being and who affirmatively expresses a belief in a Supreme Being, but to deny an exemption to a religious conscientious objector whose religious belief is not related to a positive belief in a Supreme Being and who, for lack of proof, cannot, affirmatively or categorically, profess a belief or a disbelief in a Supreme Being.

The basic issue is whether Congress, constitutionally, can make such a law which sets up such a preference, distinction and classification in respect of religions.

Statement of the Case

This statement is deemed necessary to correct certain material omissions and inaccuracies in "Petitioner's Statement" (Gov. Br., pp. 2-9).*

Neither in its "Statement", nor elsewhere in its brief, does the Government make it clear that Seeger's claim of exemption as a conscientious objector arose by reason of religious training or belief, albeit not a religious belief in relation to a Supreme Being.

As the record below shows, Seeger was denied exemption as a conscientious objector solely because his religious training and belief was not of the type of religious train-

* References herein to "Gov. Br." refer to pages of "Brief for the United States" filed by Petitioner.

ing and belief required and defined in the present statute, i.e., a belief related to a Supreme Being. Nowhere in the record or in the prior proceedings is there any evidence or any finding or holding that Seeger's conscientious objection was non-religious or based on political, sociological or philosophical views, or merely a personal moral code—rather than on a religious training and belief.

(1) As to the Concessions and Stipulations Made Below

There is no reference in the Government's brief to the stipulations and concessions made by it in the courts below, except for a brief, inexact, fine-print footnote appearing on page 77, stating:

> "On the other hand, the government has stipulated that respondent does oppose war on the ground of conscience and therefore satisfies the definition of religion in *Kauten*" (R. 49).

The Court of Appeals, in its opinion, refers to these concessions, as follows:

> "Although the government has conceded that Seeger's abhorrence of war is both sincere and predicated on 'religious training and belief,' as the phrase had been defined by this Court prior to the addition of the 'Supreme Being' clause to the statute, *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943), appellant's draft board denied the exemption on the basis of its finding that Seeger's views were not grounded upon 'a belief in a relation to a Supreme Being'." (R. 26)*

> "It is to be emphasized once again that there is no question in this case, as there was in *Jakobson*,

* References herein to "R." refer to the "Transcript of Record". References to "GX" refer to the "Government's Exhibits" herein.

> as to the sincerity of Seeger's beliefs or the tenacity with which they are held. With commendable candor, the government has fully conceded that Seeger's views fall squarely within the definition of 'religion' announced for this Circuit in *Kauten*, and subsequently reaffirmed in *Phillips* and *Reel*." (R. 37)

The decision of the District Court, also, recognized and was predicated upon these stipulated facts. It stated:

> "There was proof by stipulation that the grounds on which defendant claimed exemption are religious and arise from religious training and belief by reason of which defendant is conscientiously opposed to participation in war fall within the definitions of religion as set forth in the following cases, determined by the Second Circuit Court of Appeals: United States *v.* Kauten, 133 F. 2d 703 (1943); United States ex rel. Phillips *v.* Downer, 135 F. 2d 521 (1943); United States ex rel. Reel *v.* Badt, 141 F. 2d 845 (1944), cert. dismissed 328 U. S. 817. (See minutes 35, 36)" (R. 20-21)

As appears from the trial minutes, the Government conceded that Seeger's belief on which he based his conscientious objection and claimed exemption is religious, and arises from a religious training and belief, within the definition of religion set forth in the *Kauten, Phillips* and *Reel* cases; and he would have been entitled to exemption as a conscientious objector under the religious training and relief provision in the 1940 Draft Act, as construed by the Second Circuit Court of Appeals in those cases (R. 42-7, 48-51).

The Government further stipulated that defendant's witnesses, theological seminarians, would have testified that his beliefs and views, as set forth in his Selective Service File (GXs. 1-61; R. 55-121) on which he grounded his

claim of exemption as a conscientious objector, "are religious and arise from religious training and belief by reason of which defendant is conscientiously opposed to participation in war within the definitions of religion" as set forth in said *Kauten, Phillips* and *Reel* cases (R. 50); and "could be considered to be a religious position on a somewhat broader definition of religion" (R. 46); and "that religion is broad enough to embrace a coherent, deeply felt humanitarian, ethical, thoroughgoing abhorrence of war without a belief in a Supreme Being or super or supra-natural consequences," and, particularly, if the person involved "is responding to the voice of conscience" (R. 48).

In reliance on said stipulations, Seeger did not call such witnesses (R. 41, 43, 44-6).

On his part, Seeger conceded his religious training and belief was not a belief in a relation to a Supreme Being (R. 49-51).

Seeger's complete sincerity has been unquestioned, throughout (R. 6, 7, 10-14, 26, 29, 30, 37).

(2) As to the Reason for Denial of an Exemption to Respondent

Throughout its brief, the Government, erroneously, assumes and states that Seeger's conscientious objection and non-exemption were based on a non-religious position and on essentially political, sociological or philosophical views or a merely personal moral code. (Gov. Br. pp. 10-12, 17, 22-23, 35-6, 75-6, 77-8)

Typical statements along this line, are the following:

> "For respondent derives his opposition to war from political sociological, and philosophical analysis; he is obeying a personal moral code based upon 'how he feels towards his fellow man.'" (Gov. Br. p. 10)

* * *

> "He derives his opposition to war, sincere as his conviction may be, not from religious teaching but from essentially political, sociological, or philosophical views." (Gov. Br. p. 17)
>
> • • • •
>
> "On the other hand, non-religious objectors, like respondent, reach their moral positions entirely on the basis of their own reasoning." (Gov. Br. p. 77)

Neither the Court of Appeals nor the District Court made any such finding or holding, but found, rather, that although Seeger's grounds for exemption were religious, he was denied exemption because his religious views were not grounded upon an affirmative belief in a Supreme Being (R. 20-22, 26, 30).

Nor did the Hearing Officer so find, but rather, recommended Seeger's exemption as a conscientious objector on the ground "that his conscientious objections are based upon this individual training and belief, both of which include research and religious and cultural fields (R. 7).

Nor did the Department of Justice so find. Its recommendation was, "based upon the facts contained herein", that "the registrant has failed to make a claim within the meaning of section 6(j) of the Act, since his objections are not based upon religious training and belief in relation to a Supreme Being, as defined in said Act" (R. p. 9).

Thus, Seeger was denied exemption solely because his conscientious objection was based upon a religious training and belief, which was not related to Supreme Being and not because it was based upon a non-religious position, or upon essentially political, sociological or philosophical views or a merely personal moral code.

An underlying fallacy of the Government's arguments is its failure to recognize these conceded facts and these grounds, upon which all of the prior proceedings were based.

(3) Facts Disclosed in Respondent's Selective Service File

The Government's evidence consisted of respondent's Selective Service File and a stipulation as to respondent's refusal to submit to induction on October 20, 1960, claiming the order of induction was invalid as he had wrongfully been denied exemption as a conscientious objector (GXs. 1-61; R. 21, 55-120, 15).

Respondent offered no witnesses but, in lieu thereof, a stipulation as to proferred evidence was entered into between the Government and respondent, as noted above.

The essential facts disclosed by his Selective Service File follow:

Respondent registered with his local draft board on September 4, 1953, the day after his 18th birthday. On October 21, 1953, he executed and filed his Classification Questionnaire (GX 3; R. 55-64) answering all applicable questions and noting he was unmarried and a chemical engineering college student at Cooper Union. On this form, he did not execute the claim for conscientious objector exemption, but, as requested, simply expressed the opinion that his classification should be 2-S (student). (GXs 3, 6; R. 55-65, 15, 27).

He was initially classified 1-A on October 22, 1953. He was reclassified 2-S as a student on July 26, 1955 and remained in that classification until August 26, 1958, when he was reclassified 1-A (GXs 3, 6; R. 62-3, 65).

On July 12, 1957, respondent wrote the Board claiming exemption as a conscientious objector, because "as a result of the resolution of a number of problems of conscience with which I have been preoccupied for the past month" he was conscientiously opposed to war (GX 11; R. 66-7, 15, 27). He was sent Special Form for Conscientious Objector, which he filled out and filed with supporting

documents on July 29, 1957 (GXs 12, 13; R. 68-77, 15, 27).

Therein (GX 13; R. 69, 15-16, 27-8), defendant executed the "Series I—Claim for Exemption", as follows:

> "(B) I am, by reason of my 'religious' belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces."*

His answers to the questions in "Series II—Religious Training and Beliefs" were:

(1) As to question "1", Do you believe in a Supreme Being?", respondent did not check the "Yes" or "No" boxes, but added and checked a new third box with the notation: "Please see attached sheet.".

In the attached sheets, in answer to question "1", concerning his belief in a Supreme Being, he stated in part (R. 73, 16, 28):

> "Of course, the existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer 'yes' or 'no'.
>
> "However, skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever. The martyrdom of Socrates is sufficient proof that irony and skepticism may be consistent with positive faith."
>
> He asserted that: "Action taken through fear of God or desire for eternal reward is not moral conduct but merely expediency"; that he had more

* In doing so, he altered the printed form by placing quotation marks around the word "religious", and deleting the words "training and" (R. 28, 69).

> respect for "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed"; and that "the cosmic order does, perhaps, suggest a creative intelligence."

(2) As to question "2", "Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation." Respondent answered: "Please see attached sheet". And in the attached sheets, in answer to question "2", he further expounded the position in respect of war to which he felt driven by his conscience. He wrote, *inter alia* (R. 73-6, 28-9):

> "This brings me to what I believe to be the most ironic result of our commitment to violence—the tremendous spiritual price that man pays for his willingness to resort to the mass destruction of human life to perpetrate his 'ideals' ".
>
> • • •
>
> "A possible alternative to violence is offered by the Quakers in their pamphlet *Speak Truth to Power*, from which much of my thought is derived" (R. 76).

(3) In answer to question "3", "Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above," he wrote: Please see attached sheet." On the attached sheet (R. 77), he listed various of his readings, including those of religious writers such as Mohandas Gandhi and E. Stanley Jones, and various religious publications of the American Friends Service Committee (Quaker).

(4) In answer to questions "4", "Give the name and present address of the individual upon whom you rely

most for religious guidance," he wrote: "Please see attached sheet". On the attached sheet (R. 77), he stated:

> "I rely on no particular person for religious guidance. I resolve spiritual and ethical problems by reading relevant essays or books, by discussion and debate with colleagues, and ultimately, by following the dictates of my conscience."

(5) In answer to question "5", "Under what circumstances, if any, do you believe in the use of force?", on an attached sheet (R. 77), he referred to Tolstoi's views, based on the teachings of Jesus and the "Sermon on the Mount", that "no use of force is ever right"; and suggested that "if the way of Jesus is sublime", there still might be other ways and he tended to favor a less absolute rule of conduct in respect of the use of force.

Respondent's 2-S classification was continued until August 26, 1958 when he was reclassified as 1-A (GX 3; R. 62-3, 16). He was ordered for a pre-induction physical examination on October 17, 1958. He then requested and was accorded a personal appearance before the Local Board, which thereafter voted to continue his 1-A classification (GX 19, 3; R. 78, 62-3, 16, 29).

In October, 1958, respondent prosecuted an appeal to the Appeal Board on the ground he was a conscientious objector (GX 3, 20, 21, 24; R. 79, 16, 29, 63).

On November 18, 1958 he filled out and filed a questionnaire for a registrant claiming to be a conscientious objector (GX 24, 3; R. 81-4, 63), which was principally devoted to the "use of force," and therein he discussed religion and conscience and stated, among other things, "* * * all philosophies or religions, however sincere, must come to grips with questions which cannot be answered by pat phrases * * * the conscience must always search, sometimes painfully, for the answers to the moral ques-

tions which life presents"; and, "we can only strive for the good by a constant series of adjustments consonant with the demands of conscience and those of reality. This is called 'drawing the line'. Thus, an orthodox Jewish person must in some way reconcile traditional orthodoxy with the demands of modern life. Similarly, many Christians would, in good conscience, draw a line between their religious demands for brotherly love and samaritan-like assistance to one's neighbor, and their own business activities • • •"

In March, 1959, the Appeal Board tentatively determined he should not be classified in Class 1-O or lower, and sought an advisory recommendation from the Justice Department on his claim as a conscientious objector (GX 26, 3; R. 85, 16).

The F.B.I. conducted an investigation of him. Respondent was not permitted to see its reports or to respond thereto (GX 27-A, 27-B; R 86, 87, 16), but only a resumé thereof (GX 30(b); R. 10-14, 16-29).

The F.B.I. resumé was highly favorable to him (R. 10-14, 29, 8). It revealed he was the son of a "very fine, exceptionally religious" Roman Catholic family and two of his uncles were priests; he was an honor student in high school and had an outstanding record in college, academically and in extra-curricular activities; he was described variously, as a person of "the highest integrity and character", "serious minded", "very intelligent", "a very nice young man", a "person of high moral character", "a very good student", "sincere", "completely trustworthy", "an idealist", "a very gentle person", with a moral behavior "outstanding" and "above reproach", "absolutely sincere in his conscientious-objector claim"; he had recently "joined the American Friends Society"; he did not use profanity, smoke or drink and had no record of legal or economic difficulties (R. 10, 11, 12, 13, 14, 29, 8).

Respondent filed his comments on the F.B.I. resumé (GX 27-C; R. 88-91) in which he pointed out that a person's religious connections "are primarily a matter of individual conscience", and it cannot be expected that he "describe the items of his religious belief to professors or neighbors"; and though "for the past year the registrant has been working for the American Friends Service Committee in mental institutions and other community projects", the F.B.I. interviewed none of the Committee.

Respondent had a hearing before the Hearing Officer for the Department of Justice on September 10, 1959 (GX 27-A; R. 86). He was accompanied by two witnesses, a professor and a classmate. He indicated "that he was not affiliated with any of the sects to which many of the conscientious objectors belong, but had strong sympathetic support for the Quaker movement" and "sympathy with some of the views of Jehovah's Witnesses but criticized their dogmatic approach to the problem" (R. 5).

He testified "that he had been convinced after a thorough research and reading into history, *particularly various religious trends, theories, and teachings*, that peace throughout the world could only be accomplished by the laying down of arms by all" (R. 6). (Italics added.)

The Hearing Officer's report to the Department of Justice was never shown to respondent and has been excluded from Seeger's Selective Service File, but it is reflected in the Justice Department's recommendation dated October 22, 1959 (GX 30(a); R. 4-10); and therefrom, it appears the Hearing Officer recommended that respondent's appeal, on the ground of conscientious objection, be sustained and that he be granted exemption. As to this, the recommendation stated (GX 30(a); R. 7):

> "The Hearing Officer concluded that the registrant is completely sincere in making his claim and that the character of registrant's beliefs, as adduced

> at the hearing and from the various documents on file, are honest. He found that the registrant is opposed to participation in war in any form; that his conscientious objections are based upon his individual training and belief; both of which include research in religious and cultural fields; that the registrant is sincere in his claim which is made in good faith. He recommended that the appeal of the registrant based upon grounds of conscientious objection be sustained."

Despite this recommendation, the Department of Justice reached an opposite conclusion in its recommendation (GX 30(a); R. 9, 17, 30), stating:

> "Based upon the facts contained herein the Department of Justice concludes that the registrant has failed to make a claim within the meaning of section 6(j) of the Act, since his objections are not based upon religious training and belief in relation to a Supreme Being, as defined in said Act."

As the Court of Appeals said (R. 30):

> "It is immediately apparent from a reading of the Department's report, that its decision rested entirely on the finding that Seeger's objections, however sincere, were not based upon 'a belief in a relation to a Supreme Being', as required by §6(j) of the Act."

The Appeal Board furnished respondent with a copy of this recommendation (GX 31; R. 92) and he was permitted to, and did, reply thereto (GX 33-A, R. 93-108). After quoting concepts of Thomas Jefferson (R. 94), in which he had been "thoroughly schooled", Seeger expressed chagrin that he had to present a "defense of my right to be treated as others even though my theological notions differ from theirs" (R. 95).

He wrote:

> "What does it matter how the universe is held together? To me it would be a great crime to participate in the continuation and extension of the evils of war (R. 96).
>
> • • •
>
> "Even rejected and unpopular points of view must be protected (R. 96).
>
> • • •
>
> "How can the distribution of privileges along lines of religious or political belief be considered as other than contrary to our doctrines of freedom and equality" (R. 97).

In a paragraph on "Religion and The Deity" he said:

> "As Benjamin Franklin wisely understood, true religious motivation is not something to be identified with specific dogmas and creeds. It is especially important to realize that religious feeling need not have any connection with the supernatural. In fact, through history, the highest kind of religious feeling has occurred when men dared to throw off a burden of historic and dogmatic encumbrances which were fundamentally irrelevant to the problems of life. John Stuart Mill held that the essence of religion is a sense of unity with mankind. According to Auguste Comte 'religion . . . finds its actual expression in the active service of humanity.'
>
> "Little can be said to justify a contention that people who do not assert the existence of a divinity beyond the realm of nature are not as devoted to just and humane causes as those who do. The overwhelming majority of thinkers would deny any *exclusive* identification of belief in supernatural systems with religiousness and right conduct" (R. 98).

(After discussing John Dewey, Seeger made a statement, quoted on pages 8-9 of the Government's brief, which is completely in line with the concept of religion set forth in the *Kauten* case.)

In another paragraph (R. 99-100), he commented on concepts of God. He said: "The result is a wide variety of contradictions in what people would have us believe is the word of God." He said he had no quarrel with "otherworldly religion", but that:

> "Since traditional religious causes have encompassed both great good and great evil perpetrated in the name of God, how can citing God be itself considered an indicative factor of the justice or merits of a cause (R. 100)?
>
> * * *
>
> "Nowadays not even the most orthodox theologian pretends that the existence of God is something which can be 'proven'. Those who grant the existence of a Deity outside the power of nature usually understand that this is so by mystical perception or faith" (R. 100).

In an "Appendix" he set forth the views of some famous persons, concerning the nature of "religion". To these the Court is referred (R. 103).

Attached to these papers was a hand written statement from Seeger's mother which attests to his sincerity and the family background of his conscientious objection and his religious beliefs and training, although he "departed from the formal faith in which he was reared, but not from the ideas that were crooned to him", and left home because of "differences on the subject of religion" (R. 105, 108).

On May 23, 1960, the Appeal Board voted to classify him as 1-A (GXs 34, 36, 37-A; R. 110, 111, 112).

At respondent's request, and on his behalf, the National Director of Selective Service appealed to the Presidential

Appeal Board (GXs 37-A, 37-C, 37-D, 43, 44; R. 112, 113, 114, 115, 116), which on August 25, 1960, voted to classify him 1-A (GX 48; R. 117).

On October 3, 1960, respondent was ordered to report for induction on October 20, 1960 (GX 51; R. 118). He reported at the place specified but refused to submit to induction (GX 52; R. 119), claiming he had been wrongfully denied exemption as a conscientious objector, seemingly, in part, basing his refusal on his membership in American Friends Service Committee. On the trial he so stipulated (GX 61; R. 121).

On December 1, 1960, respondent was reported to the United States Attorney for prosecution as a delinquent (GX 56; R. 120). Two years later he was indicted (R. 3).

(4) Prior Proceedings

By indictment filed November 13, 1962, respondent was charged with a violation of Section 462 of the Universal Military Training and Service Act (Title 50, App., U.S.C. §§ 451, et seq.) and the rules and regulations thereunder (32 Code of Federal Regulations, Section 1632.14 for unlawfully and knowingly failing and refusing to perform the duty of submitting to induction on October 20, 1960 (R. 2, 3, 14, 26).

Respondent appeared and entered a plea of "not guilty" on November 20, 1962, was released on his own recognizance, and waived a jury trial (R. 2, 15).

He was tried before District Judge Richard H. Levet on March 26, 1963 (R. 41-54, 15). Thereon, a motion to dismiss the indictment was made on the constitutional grounds, there stated (R. 41, 53-4). Decision was reserved (R. 54).

In a decision and opinion filed April 24, 1963 by Judge Levet, respondent was found guilty (R. 14-25; 216 Fed. Supp. 516). On May 28, 1963, respondent was sentenced

to imprisonment for one year and one day, not suspended, and was released on his own recognizance pending appeal (R. 2; Transcript of Sentencing Proceeding). The judgment was made and entered on that date (R. 2).

His appeal to the Court of Appeals was duly noticed on June 6, 1963. On January 20, 1964 the Court of Appeals unanimously reversed the judgment of the District Court, with an opinion holding the statute unconstitutional, and entered judgment accordingly (R. 25-40; 326 F. 2d 846).

On March 20, 1964, the Government filed a petition for a writ of certiorari, which was granted by this Court on May 4, 1964 (377 U. S. 922).

ARGUMENT

POINT I

Section 6(j) of the Universal Military Training and Service Act (50 U.S.C.A., App. §456(j)), as amended by Congress in 1948 by the insertion of the "Supreme Being" provision, is invalid, as in violation of the "religion" clauses of the First Amendment of the United States Constitution.

Under the First Amendment, Congress can "make no law respecting an establishment of religion, or prohibiting the free exercise thereof".

Section 6(j) of the present Universal Military Training and Service Act, under which respondent was indicted and convicted (65 Stat. 75 (1951), as amended; 50 U.S.C.A., App., 456(j)), so far as relevant, provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of

> the United States who, *by reason of religious training and belief,* is conscientiously opposed to participation in war in any form. *Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.* * * *" (Italics supplied)

Section 5(g) of the Selective Training and Service Act of 1940 (54 Stat. 885, 889), provided:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

In enacting Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-3), which is identical with §6(j) of said 1951 Act here under discussion, Congress substituted "armed forces" for "land or naval forces" in the above quotation from the 1940 Act, and added thereto the following amendment:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."

Section 6(j), inherently, and as applied to deny respondent an exemption, is violative of both the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment.

By this amendment, Congress restricted prior definitions and concepts of "religious training and belief" to *only* a "belief in a relation to a Supreme Being".[1]

Congress thus created a preference and an aid in favor of conscientious objectors whose conscientious objection is related to, or based upon, a belief in a Supreme Being, as against those conscientious objectors whose conscientious objection is related to, or based upon, some other type of religious training and belief.

Congress, thus, has passed a law and has imposed a requirement which aid those religions based on a belief in the existence of "a Supreme Being" or "one God", as against those religions founded on different beliefs, and has preferred one type of religion over another and religions as against non-believers. It has abandoned the "neutral" position in respect of religions placed on government by the First Amendment.

As noted above, respondent was refused exemption as a conscientious objector, under said law, solely because his religious training and belief, from which his conscientious objection arises, was not, affirmatively, a belief in a relation to a Supreme Being (R. 9, 20-24, 30). Concededly, his conscientious objection arises from religious training and belief, though not one related to belief in a Supreme Being. He is not a "non-religious objector". There is no finding or suggestion in the proceedings below that his conscientious objection was based on essentially political, sociological or philosophical views or merely personal code or anything else but religion. (Cf. Gov. Br. pp. 10-12, 17, 22-3, 35-6, 75-8.)

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1. No prior federal draft act has contained such a "Supreme Being" provision. See 1863 Civil War Draft Act, 12 Stat. 731 (1863), as amended in 1864, 12 Stat. 733; Selective Draft Act of 1917, 40 Stat. 76 (1917); Selective Training and Service Act of 1940, 54 Stat. 885 (1940). (See Point V, infra).

(a) As to the "Establishment Clause"

Such statute is clearly unconstitutional under the "Establishment Clause" of the First Amendment and the recent decisions of this Court.

In *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), this Court stated, at page 495:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. (11)"

In the cited footnote, this Court stated:

> "(11) Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society* v. *District of Columbia,* 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda,* 153 C.A. 2d 673, 315 P. 2d 394; II Encyclopedia of the Social Sciences 293; 4 Encyclopedia Britannica (1957 ed.) 325-327; 21 id., 797; Archer, Faiths Men Live by (2d ed. revised by Purinton), 120-138, 254-313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47."

In that case, Maryland had denied Torcaso a commission as a notary public because he would not declare his belief in God, as required under the State constitution. This Court held that that State law violated the "Establishment Clause" of the First Amendment. The language quoted above from *Torcaso* was reiterated and reaffirmed

in *Abington School District* v. *Schempp*, 374 U. S. 203, 220 (1963).

These constitutional principles were anticipated and stated by this Court in several of its earlier decisions preceding *Torcaso* and have been reaffirmed in several of its subsequent decisions.

In *Everson* v. *Board of Education*, 330 U. S. 1 (1947) this Court stated:

> "'The establishment of religion clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'."

In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 210-11 (1948) this Court was requested and specifically refused to repudiate as "dicta" the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage and reiterated the *Everson* statement as to the meaning of the establishment of religion clause. See, also, *Zorach* v. *Clauson*, 343 U. S. 306, 312, 314-5 (1952), which followed the *McCollum* case. Said *Everson* statement was again reaffirmed in the *Torcaso* case, *supra*, in *McGowan* v. *Maryland*, 366 U. S. 420 (1961), in *Engel* v. *Vitale*, 370 U. S. 421 (1962) and in *Abington School District* v. *Schempp*, 374 U. S. 203 (1963). These principles are now "universally recognized", said this Court in *Schempp* (at page 220).

In a recent commentary on "Conscientious Objector Provisions: A View In The Light Of *Torcaso* v. *Watkins*" (Vol. 51 The Georgetown Law Journal, 252), the law professor, Conklin, says (at pages 252, 254):

> "The sweeping language utilized in *Torcaso* all but explicitly rules the 'belief in a Supreme Being' clause of the 1948 Selective Service Act unconstitutional * * * in reaching its decision the Court had to repudiate the definitions of religion given in a whole series of previously decided cases."*

and further (at page 276):

> "It is now evident that the line of reasoning followed by Judge Hand in *Kauten* has been adopted by the Supreme Court as the current interpretation of the meaning of the word 'religion' in the first amendment. In *Torcaso* v. *Watkins* the Supreme Court, in holding that the Maryland religious test for public office which required a declaration of belief in the existence of God was an unconstitutional invasion of appellant's freedom of belief and religion, all but explicitly declared that the 'Supreme Being Clause' of the Selective Service Act is now unconstitutional. The opinion of the Court, authored by Mr. Justice Black, clearly demonstrates that the 'Supreme Being Clause' is repugnant to the first amendment since it aids 'all religions as against non-believers,' and aids some 'religions based on a belief in the existence of God as against those religions found on different beliefs.'"

In *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-4 (1940), decided under the "Free Exercise Clause", the Court stated:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion

* *E.g., United States* v. *Macintosh*, 283 U. S. 605 (1931); *Church of the Holy Trinity* v. *United States*, 143 U. S. 457 (1892); *Davis* v. *Beason*, 133 U. S. 333 (1890).

or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. * * * Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

In *Engel, supra,* the Court stated (at pp. 430-432):

"The Establishment Clause, unlike the Free Exercise Clause does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. * * * The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (Italics added)

In *Schempp, supra,* this Court again reviewed its prior decisions in this field and reaffirmed the above noted principles of law established therein. It not only reiterated the above language from *Torcaso* (at p. 220) and the above quotation from *Engel* (at pp. 221-2), but stated further (at p. 226) as follows:

> "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

And elsewhere in that opinion (at pp. 215-6) it reviewed the prior cases and reaffirmed "this *'neutral'* position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government"; and asserted that "all religious opinions and sects" have "absolute equality before the law"; and, "The Government is neutral, and while protecting all, it prefers none, and it disparages none".

This Court has repeatedly and variously expressed the constitutional principles that the Government must be completely neutral as between religions, cannot discriminate between religions, cannot prefer one religion over another or select any one group or any one type of religion for preferred treatment, cannot prescribe what shall be orthodox in religion, and cannot pass laws which aid one religion or all religions. *Everson* v. *Board of Education,* 330 U. S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 210 (1948); *Zorach* v. *Clauson,* 343 U. S. 306, 317, 319 (1952); *Torcaso* v. *Watkins,* 367 U. S. 488, 492, 495 (1961); *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 214 (1963); *Sherbert* v. *Verner,* 374 U. S. 398, 404, 409 (1963); *Cantwell* v. *Connecticut,*

310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); *United States* v. *Ballard*, 322 U. S. 78, 86 (1944); and *Fowler* v. *Rhode Island*, 345 U. S. 67, 69 (1953).

This Court said in *United States* v. *Ballard, supra* (at p. 86):

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * * Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education *v.* Barnette, 319 U. S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. * * * The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting view. Man's relation to his God was made no concern of the state. * * * The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. Murdock *v.* Pennsylvania, 319 U. S. 105." (Emphasis supplied.)

By enacting Section 6(j), Congress has in effect, established as an official religion—a religion that is related to a belief in a Supreme Being—and it has placed the support of the Government behind this particular religious belief;

and it has caused the Government to prefer and to align itself with that particular form of religion; it has abandoned and violated the "neutral" position, constitutionally imposed on the Government; and it has established by legislative fiat the religious orthodoxy of the "Supreme Being" religious belief. It has made man's religious relation to God or a Supreme Being the concern of the state.

This, it is submitted, constitutes a clear violation of the "Establishment Clause" of the First Amendment.

(b) As to the "Free Exercise Clause"

Section 6(j) also violates the "Free Exercise Clause", in relation to respondent.

The "Free Exercise Clause" and the "Establishment Clause" forbid two quite different kinds of governmental encroachment upon religious freedom, though they may overlap, as here. *Abington School District* v. *Schempp*, 374 U. S. 203, 221 (1963); *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962).

It may be, as the Government states (Gov. Br. pp. 20, 33) that this statute protects, in the free exercise of their religion, those conscientious objectors whose religion is based on belief in a "Supreme Being", because it permits them to avoid a course of conduct which their religion condemns.*

The Government's argument is that Congress is simply endeavoring to give the greatest possible latitude to the free exercise of religion when it enacted this conscientious objector provision. It is probably true, historically, that one reason for granting exemption from military service to religious conscientious objectors was to recognize rights

* This, of course, is an indirect recognition that it would constitute a prohibition of the free exercise of religion for Congress to make a law which denies such an exemption to *any* religious conscientious objector, whether or not he believes in a Supreme Being.

of conscience; probably another reason was the recognition, from experience, that to force a sincere conscientious objector to participate in war was doomed to fail (Cf. Gov. Br., p. 43).

But this does not allow for the "free exercise" of *their* religion by conscientious objectors, like respondent, whose religion is not related to a "Supreme Being" belief (nor for any "free exercise" rights to non-religious conscientious objectors), however sincerely they may oppose military service.

Therefore, so far as respondent is concerned, the statute is a law prohibiting the "free exercise" of his religion.

As pointed out by the Second Circuit Court of Appeals in *United States* v. *Jakobson*, 325 F. 2d 409, 415; (Jakobson Record, p. 35), a statute that protects the "free exercise" of only a few favored religions or prefers some religions over others, violates the First Amendment. As that Court there said:

> "The freedom which the Constitution protects is the freedom to exercise the religion of one's choice; a statute limited to certain religions would restrict the free exercise of the disfavored ones."

To the same effect is that Court's opinion in this case (R. p. 35).

As this Court has said:

> "The Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone* • • •" *Schempp, supra,* at p. 226.

This includes persons of non-theistic beliefs.

The Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by protecting any invasions thereof by civil authority." *Schempp, supra,* at pp. 222-3.

The coercive effect of Section 6(j), as it operates against respondent in the practice of his religion, is quite apparent. When the power and prestige of the Government is placed behind a particular religious belief—here a religious belief related to a "Supreme Being"— there is an indirect coercive pressure upon draft registrants of religious minorities to conform to the prevailing officially approved religion in order to obtain exemption as a conscientious objector. *Schempp, supra,* at pp. 221-3.

The disqualification of respondent for exemption benefits would impose a burden on the "free exercise" of his religion.

The fact that Seeger is not compelled to request an exemption is no excuse for barring him from exemption by state imposed criteria forbidden by the Constitution. *Torcaso, supra,* at pp. 495-6.

Concededly, his declared ineligibility for exemption is derived solely from the practice of his religion and the pressure upon one in his position to forego that practice is inevitable.

The ruling of the Draft Board forced him to choose between following the precepts of his religion and forfeiting the exemption benefit and inviting and facing imprisonment, on the one hand, and abandoning one of the precepts of his religion in order to obtain exemption status, on the other hand.

Governmental imposition of such a choice puts a substantial burden on the free exercise of religion. *Sherbert v. Verner*, 374 U. S. 398, 403-4.

In *Sherbert*, this Court held it to be a violation of the Free Exercise Clause for a state to disqualify a person from benefits of an unemployment compensation act because her unemployment flowed from her conscientious scruples against working on a Saturday as a member of the Seventh Day Adventist Church. This, the Court said, imposed a "burden on the free exercise of appellant's

religion"; and that this was so even if the consequences of such disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competency to enact, rather than a direct compulsion resulting from criminal sanctions.

In Seeger's case, confronted as he was with possible imprisonment, the compulsion was more direct than in *Sherbert*.

While the District Court sentenced respondent to be punished directly because of his failure to submit to induction (R. 14-15, 24-5), his punishment, indirectly, flowed from his religious beliefs. His failure to submit to induction, his indictment, his conviction and his jail sentence stemmed directly from the denial to him of an exemption because of the particular nature of his religious training and belief.

In *Sherbert, supra*, this Court, quoting from *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961), stated in relation to the "free exercise" point:

> "For [i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

Section 6(j) certainly discriminates invidiously between religions.

Respondent, by invoking his conscientious belief, was not committing an act which was in violation of any criminal statute, as in the cases of *Davis* v. *Beason*, 133 U. S. 333 (1890); *Reynolds* v. *United States*, 98 U. S. 145 (1878); *Cleveland* v. *United States*, 329 U. S. 14 (1946); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

Nor could it be said that his act is not an expression of an honest and legitimate religious concern, impulse and principle. The Quakers and other religious groups long have had tenets against participation in war activities;

and the Founder of Christianity is said in the Bible to have been heralded into this world with the words: "Glory to God in the highest, and on earth peace, good will toward men", and to have expressed pacifist teachings and blessed peacemakers in his Sermon on the Mount.

Nor does the freedom asserted by respondent bring him into collision with rights asserted by other individuals. His right or privilege of exemption based on his religious beliefs is personal to him.

Nor does the exercise of his conscientious religious objection conflict with the public interest—because the statute, in so far as it provides exemptions to conscientious objectors and particularly to those having a "Supreme Being" belief, was presumably enacted in the public interest. There is no "public interest" or governmental imperative that requires a distinction in exemptions between theistic and non-theistic religious objectors.

Elsewhere herein (see Point III), it is pointed out that the free exercise of religion cannot be denied because draft exemption may be a "privilege" instead of a right, for the reason that even a privilege of exemption must be available to all on a non-discriminatory basis; and that to deny such a privilege because of kind of religious belief is to penalize that belief and the person affected.

Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities. *Sherbert, supra,* at p. 402.

In *Hamilton* v. *Regents,* 293 U. S. 245 (1934) the Court held that the "liberty" guaranteed by the Fourteenth Amendment did not confer upon conscientious religious objectors to war and military training, the right to attend a state university without taking a military science course required by the State of all male students. It pointed out that the State had "not drafted or called them to attend the university".

In *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943); overruling *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940), this Court held it to be a violation of a public school child's free exercise of her religion under the First Amendment to compel her to participate in a "flag salute" exercise against her religious conscientious objection, even though it was claimed that such exercise was in the interest of "national unity". The Court said this was not a "permissible means" to achieve national unity, but, rather, transcended constitutional limitations; and that governmental officials could not prescribe what should be orthodox in religion.

It may be assumed, for present purposes, that the current, peacetime Draft Act has a legitimate secular, governmental goal and purpose; but in achieving that secular goal and purpose Congress cannot grant exemptions therefrom to conscientious objectors on a basis which discriminates between religions related to one "Supreme Being" and religions not so related.

The question whether the Government must grant draft exemptions to *anyone* (religious or non-religious conscientious objectors), is not involved here. Having granted draft exemptions, Congress may not discriminate between religious conscientious objectors believing in a "Supreme Being" and conscientious objectors not so believing.

Nor, is there any compelling necessity for the Government to so discriminate. The exemption of all convinced religious objectors, without regard to the nature of their religious belief, would not frustrate the purposes of the draft. In fact, the Draft Act of 1940, which granted the exemptions based solely on a "religious training and belief", did exactly that and effectively acheived its purpose. Moreover, it might be argued convincingly that the exemption of all sincere conscientious objectors would not frustrate the purpose of the draft. For a number of

years, Great Britain has had a draft act that does exempt *all* conscientious objectors, and every indication is that it has acheived its primary purpose of raising an army. "The Statutes Revised" (3rd Ed., 1948), Vol. XXXI, p. 471; 11 and 12 Geo. 6 c. 64, Sections 17, 18, 19. Similar draft acts exist in Canada, Australia, New Zealand, Sweden, Denmark, Finland, Norway and Federal Republic of Germany; and in The Netherlands religious *or* moral concientious objectors are exempt.

Moreover, there is no real reason to believe that the exemption of all sincere religious conscientious objectors or of all sincere conscientious objectors would not be just as workable as the present "Supreme Being" test. The Selective Service authorities had no difficulty in determining the sincerity of Seeger, even though he did not assert a positive belief in a "Supreme Being".

It is certainly no more difficult for the draft authorities to determine whether or not a registrant has a sincere "religious belief" than to determine whether or not a registrant believes in "a Supreme Being", as the records in the companion *Peter* and *Jakobson* cases attest. (Nos. 29, 51, this term.)

Moreover, it is indeed questionable, in light of the history of religions, that in respect of matters of conscience there are any fewer frauds and hypocrites among adherents to theistic religions than among adherents to non-theistic religions, or among those professing religious beliefs than among those professing moral, philosophical, political, ethical or sociological beliefs (Cf. Jackson, J., dissenting opinion, *United States* v. *Ballard,* 322 U. S. 78, 92-5 (1944)).

There is certainly no more propriety in distinguishing between religious beliefs which are solely the result of individual reading, reflection and training and those which the believer assumes to be the product of divine commands; or between internally derived and externally

compelled beliefs; or between the "voice" of conscience and the "voice" of an unidentified and unidentifiable supernatural deity. (R. 35, 37; Cf. dissenting opinion in Berman, *infra*, pp. 49-50).

As the Court of Appeals herein said (R. 37):

> "The government has argued that the 'Supreme Being' standard may be justified as implifying the task of the draft boards by providing an objective standard for the determination of sincerity and religious belief. In light of *Jakobson's* expanded definition of 'Supreme Being', the test would hardly be free from complexities. In any event, 'government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.' *School District of Abington Township* v. *Schempp*, 374 U. S. 203, 265 (1963) (concurring opinion of Brennan, J.)"

It is submitted that Section 6(j), inherently and as applied, also constitutes, as to Seeger, a clear violation of the "Free Exercise Clause" of the First Amendment.

POINT II

The "Supreme Being" provision of Section 6(j) also violates the due process clause of the Fifth Amendment of the Federal Constitution.

Under the Fifth Amendment, Congress cannot deprive a person of life, liberty or property without due process of law.

The classifications set up in Section 6(j) are arbitrary and discriminatory in that they permit the exemption from military service of a person whose religious training and belief is related to a Supreme Being, but deny such exemption to persons whose religious training and belief is not related to a Supreme Being.

Such a classification violates the First Amendment, as noted. It also constitutes a denial of substantive due process and violates the due process clause of the Fifth Amendment.

The Court of Appeals, in properly holding "the Supreme Being" requirement to create an "impermissible classification" stated:

> "* * * we cannot conclude that specific religious concepts, even if shared by the overwhelming majority of the country's organized religions, may be selected so as to discriminate against the holders of equally sincere religious beliefs. Especially when considered in the light of *Torcaso* and the still more recent teachings of the Supreme Court, a line such as is drawn by the 'Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment. We are convinced that the believer in a Supreme Being is not for that reason alone more entitled to have his conscience respected by a draft board than is Daniel Seeger." (R. 38)

While the Fifth Amendment contains no "equal protection" clause, as does the Fourteenth Amendment, the "due process of law" clause of the Fifth embodies the concept of "equal protection of the laws". These two concepts both stem from our American ideal of fairness and are not mutually exclusive. The "equal protection of the laws" is merely a more explicit safeguard of prohibiting unfairness than "due process of law". Discrimination may be so unjustifiable as to be violative of due process. See *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

In the *Bolling* case, which involved Congressional legislation, this Court stated:

> "Classifications based solely upon race must be scrutinized with particular care, since they are

contrary to our traditions and hence constitutionally suspect."

This Court said such classifications constituted a denial of due process of law under the First Amendment which includes the concept of equal protection of the laws.

It is equally clear that classifications based solely upon religion, or types of religion, are constitutionally suspect and prohibited.

The "Supreme Being" provision in Section 6(j), *per se* and as applied to deny an exemption, is an unjustifiable religious discrimination under the First Amendment and; therefore, inherently and as applied to deny Seeger an exemption, constitutes as to him a denial of equal protection of the laws and due process of law under the Fifth Amendment.

The test of legislation which collides with the Fifth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fifth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. Cf. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

In setting up, in Section 6(j), a classification based solely upon different types of religion, Congress has entered into a forbidden field of legislation; and, in relation to the prohibitions of the First Amendment, its classification is arbitrary and discriminatory.

Even if it were to be assumed that a statutory classification which draws a line between religious objectors and non-religious objectors would be a reasonable and justifiable discrimination, that is no answer to the point that a statutory exemption classification which discriminates between types of religion is arbitrary and unjustifiably discriminatory in violation of the First and Fifth Amendments.

POINT III

That the exemption benefit granted under Section 6(j) may represent merely a "privilege" and not a "right" does not save this statute from constitutional infirmity.

The District Court stated, in convicting respondent (R. 22-4), that Congress, under its power "to raise and support Armies" (U. S. Const., Art. 1, Sec. 8, Cl. 12) has an unchallengeable right to grant or withhold exemption from military service as it sees fit and to define the categories of those who may be exempted; that a conscientious objector has no constitutional right to such exemption and may be compelled to serve in the military against his will and without regard to his religious convictions; and that such exemption is a matter of legislative grace or privilege which comes not from the Constitution but from acts of Congress. Cited for these propositions are various cases, including *Hamilton* v. *Regents,* 393 U. S. 245, 263-4 (1934); *United States* v. *Macintosh,* 283 U. S. 605, 622-4 (1931), overruled by *Girouard* v. *United States,* 328 U. S. 61, 69 (1946); *Selective Draft Law Cases,* 245 U. S. 366 (1918); *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29 (1905).

But, as the Court of Appeals, in reversing the District Court, said, it is "unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress" (R. 33).

It is not even necessary here to determine whether Congress, constitutionally, can grant exemptions to religious conscientious objectors while denying exemptions to non-religious conscientious objectors.

The question here is whether Congress can favor theistic over non-theistic conscientious objectors, in granting exemptions.*

Even if exemption is a matter of grace, Congress may not grant or deny the privilege of exemption on a basis which is discriminatory under the First and Fifth Amendments.

To deny a registrant or citizen exemption because of his religious belief, or the nature of such belief (in relation to a Supreme Being, for instance), is, in effect, to penalize him for such belief and to penalize that belief, and this is so, even if an exemption is considered a "privilege" or a "matter of grace". *Speiser* v. *Randall*, 357 U. S. 513, 518-9, 536 (1958); *First Unitarian Church* v. *Los Angeles*, 357 U. S. 545, 546-7 (1958); *Sherbert* v. *Verner*, 374 U. S. 398, 404-5 (1963).

As the Court of Appeals said (R. 33):

> "* * * it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See *Speiser* v. *Randall*, 357 U. S. 513 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

As this Court said in *Sherbert, supra*, at pages 404-5:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Cases cited.)

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* Several recent law journal "comments" have questioned the constitutionality of Section 6(j) not only because it discriminates between theistic and non-theistic conscientious objectors but, also, it discriminates between religious and non-religious conscientious objectors, regardless of their sincerity and good faith. 50 Va. L. Rev. 178, 182-3; 64 Col. L. Rev. (No. 5), 938, 948, 950 (1964); 48 Minnesota L. Rev. 770-71, 775-78 (1964).

In *Speiser, supra,* this Court pointed out that even though a tax exemption is a "privilege" or "bounty", its denial may infringe speech; and emphasized that the imposition of conditions upon public benefits, even a gratuitous benefit, cannot be sustained if they operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. See *Sherbert, supra,* at p. 398.

So, here, even assuming exemption of a conscientious objector from military service is merely a "privilege", "grace" or "bounty" solely dependent upon the will of Congress, it does not follow that the granting or denial of such privilege may be effected under conditions or classifications which constitute a denial of constitutional rights under the First or Fifth Amendments. That is what Congress has done here.

The fact that Seeger is not compelled to believe or disbelieve in a Supreme Being, under compulsion, or is not compelled, except by conscience, to request exemption from military service, cannot possibly be an excuse for barring him from such exemption benefits by government imposed criteria forbidden by the Constitution. *Torcaso* v. *Watkins,* 367 U. S. 488, 495-6 (1961).

Here, Seeger, if his conviction and sentence were not reversed, would be discriminated against, penalized, punished and imprisoned because of his religious beliefs—by being denied the exemption because his religious belief is not related to a Supreme Being.

POINT IV

The "religion clauses" of the First Amendment are applicable to all kinds of religion—religions related to a belief in a Supreme Being and religions of other beliefs—and include respondent's religion.

It is conceded that respondent's conscientious objection is sincere and religious, though not related to a Supreme Being belief, and would come within the definition of "religion" in *Kauten* and the "religious training and belief" provision of the 1940 Draft Act.

The government, in order to justify the present "Supreme Being" statute, seeks to engraft on the "religion clauses" of the First Amendment a "Supreme Being" religious belief. Manifestly, the First Amendment cannot be so circumscribed. It includes and is applicable to all kinds of religion, whether or not related to a Supreme Being belief.

The Federal Constitution contains no reference to a "Supreme Being" or to "God" or to any other divinity.

The term "religion" is used only twice in the Federal Constitution—in the First Amendment and in Article VI, Clause 3. "Religion" is not defined in the Constitution. Nor is it confined in any degree or respect as to nature, scope, meaning or application.

It was intended to have a broad and comprehensive meaning.

The Framers of the Constitution, in Article VI, Clause 3, chose, deliberately, to make non-believers, as well as believers and disbelievers, eligible to any office or public trust under the United States, including President. They did so in face of efforts in the Constitutional Convention to require a belief in the existence of a Deity. (David Hutchison, The Foundation of the Constitution, pp. 280-

281; Torpey, Judicial Doctrines of Religious Rights in America (1948), p: 18-19; Stokes, Church and State in the United States, Vol. 1, p. 521-8, 532-6) and at a time when most of the states legally required religious qualifications for public office, as they had earlier as colonies.*

No one would seriously suggest that this "religious test" provision means that only those having a belief in a Supreme Being are really eligible for public office and yet, the Government argues that the "one Supreme Being" test should be read into the "religion" of the First Amendment. (See, also, *infra*, pp. 69-70.)

Several of the earlier decisions of this Court contain statements which, under its later decisions could not be considered as constitutionally sound as restricting the Constitutional concept of religion. In *Church of the Holy Trinity* v. *United States*, 143 U. S. 226, 457, 470-1, it was stated "we are a Christian people" and "this is a Christian nation". In *Davis* v. *Beason*, 133 U. S. 333, 342 (1890), it was said: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."

In *United States* v. *Macintosh*, 283 U. S. 605, 625 (1931), (overruled in *Girouard* v. *United States*, 328 U. S. 61 (1946) reappeared the concept, "we are a Christian people", and in the dissenting opinion therein Chief Justice Hughes, apparently relying on the *Beason* statement, said, (at page 633-4):

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relations. * * * One cannot speak of

* Six states required a belief in Protestantism, two in Christianity; four, in the divine inspiration of the Bible; one, in the Doctrine of the Trinity; two, in "one Supreme Being." Cobb, The Rise of Religious Liberty in America, p. 501; Torpey, Judicial Doctrines of Religious Rights in America, p. 16.

religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God."

These earlier judicial utterances cannot restrict or limit the correct Constitutional concept of religion. One commentator recently pointed out that in reaching its decision in *Torcaso* the Court had repudiated the definitions of religion given in these prior cases. (See Conklin, supra, at p. 24, Vol. 51 The Georgetown Law Journal, 252, 254).

This Court has repeatedly said in its more recent decisions that the "religion clauses" of the First Amendment must be given a broad and comprehensive meaning and application. There is no need to review and repeat here the variety of statements in which this principle has been expressed in those cases, except to say that in no instance has there been any expression which would limit the Constitutional religious concept to a belief in a Supreme Being. See the following: *Everson* v. *Board of Education*, 330 U. S. 1, 14-15 and Rutledge, J. dissenting opinion at pp. 31-33 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *West Virginia* v. *Barnette*, 319 U. S. 624 (1943); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *United States* v. *Ballard*, 322 U. S. 78 (1944); *Follett* v. *McCormick*, 321 U. S. 573 (1944).

Mr. Justice Frankfurter stated in *McGowan*, supra (at p. 461):

> "By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives."

and in his dissenting opinion in the *Barnette* case, *supra,* (at page 658) he stated:

> "When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations."

and in *Barnette* at page 658, as in *Saia* v. *New York,* 334 U. S. 558, 564 (1948), he referred to the "allowable range of judgment regarding the scope of religion" and mentioned in this connection Judge Augustus Hand's definition in *Kauten.*

Today, this nation is far more heterogeneous religiously than it was when the Constitution was framed. The addition of Hawaii and Alaska to the United States, alone, has added many adherents of Oriental and primitive religions. Today's interpretation of the First Amendment must be responsive to the nature of religious questions in contemporary society. (Brennan, J. concurring, *Schempp* case, *supra,* at p. 241.)

This Court has repeatedly referred to the writings of Jefferson and Madison to throw illumination on the meaning of the First Amendment. (e.g., *McGowan,* at pp. 437-8; *Everson,* at pp. 11-14.) In his "Memorial and Remonstrance" (see Appendix to dissenting opinion in *Everson* v. *Board of Education,* 330 U. S. 1, 64, 66), Madison stated, among other things:

> "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. * * * We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. * * * Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."

Madison co-authored in 1776 Virginia's "Declaration of Rights" which provided, inter alia, that "all men are equally entitled to the freedom of religion, according to the dictates of conscience * * *" (9 Hening's Statutes of Virginia 109, 111-12; McGowan, supra, p. 438).

In Jefferson's "Virginia Statute for Religious Freedom" (12 Hening, Statutes of Virginia (1823), 84-6) it was stated in the Preamble:

> "* * * that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; * * * that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; * * * that it is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order;

and it was enacted:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry

> whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities."

Jefferson, in his "Notes on Virginia" wrote:

> "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God." (*Padover*, "The Complete Jefferson", p. 675)

In his "Notes on Religion", Jefferson stated:

> "The life and essence of religion consists in the internal persuasion or belief of the mind." (*Padover, supra*, p. 944)

Later therein, quoting from Locke, he said, "neither Pagan nor Mohammedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion." (*Padover, supra*, p. 945)

In his letter to Benjamin Rush in April, 1803, he wrote:

> "My views * * * are the result of a life of inquiry and reflection * * * I am a Christian in the only sense in which I believe Jesus intended anyone to be, sincerely attached to his doctrines in preference to all others; ascribing to himself every human excellence, and believing that he never claimed any other." (*Foote*, "The Religion of Thomas Jefferson" (1947, 1960) at p. 4)*

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* The Jefferson Bible is surely a "religious" book, but in compiling it Jefferson collected only the sayings of Jesus and eliminated the miraculous passages concerning him. He entitled it "The Philosophy of Jesus" or "The Life and Morals of Jesus". (See *Foote, supra*, at pp. 61-7 and any edition of the Jefferson Bible.)

In a letter to his nephew Peter Carr, he gave this advice:

> "Your reason is now mature enough to examine religion * * * Shake off all the fears and servile prejudices, under which weak minds are servilely crouched. Fix reason firmly in the seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of God, because if there be one, he must more approve of the homage of reason than that of blindfold fear * * *. Your own reason is the only oracle given you by heaven, and you are answerable not for the rightness, but the uprightness of the decision." (*Foote, supra,* at pp. 77-8)

As pointed out in *Torcaso,* among the religions in this country which do not teach what would generally be considered a belief in the existence of God or a Supreme Being are Buddhism, Taoism, Ethical Culture and Secular Humanism. Cf. *Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda,* 153 Cal. App. 2d 673, 315 P. 2d 394. See, also, Prof. Cahn's recent article on "Government and Prayer", New York University Law Review, Vol. 37, No. 6, pp. 981, 993-4 (Dec. 1962) where reference is made not only to various non-theistic religions but, also, to various polytheistic, pantheistic and ethical religions.

In *United States* v. *Kauten,* 133 F. 2d. 703 (2 Cir. 1943), the Court affirmed the registrant's conviction, for failing to report for induction, under the Selective Training and Service Act of 1940 (50 U.S.C.A. App. § 305(g)) on the ground that registrant's conscientious objection was not predicated on a religious training and belief but, rather, on his philosophical and political convictions. The Court, through Judge Augustus N. Hand, stated:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. * * * Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortal'; impelled Socrates to obey the voice of his 'Daimon' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

This concept was followed, and this definition of religion was reiterated, in *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845 (2 Cir., 1944) where the same Court, through

Judge Augustus N. Hand, held that it was error for a registrant to be denied exemption as a conscientious objector because his conscience was not related to a Deity or supernatural power; and in *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521 (2 Cir., 1943) where, again, the same Court, through Judge Clark, held that the Hearing Officer under the Selective Service Act of 1940 had erroneously denied the benefits of the exemption to a registrant whose religious training and beliefs were not related to a Supreme Being or to a particular religious sect or denomination.

A different conclusion was reached in *Berman* v. *United States*, 156 F. 2d 377 (9 Cir., 1946), cert. den. 329 U. S. 795 (1946), where the registrant's objection was based entirely upon a philosophical, social or political policy and not upon a religious belief; but, where the Court, by way of *dictum*, held that the words "religious training and belief" in Section 5(g) of the Selective Training and Service Act of 1940 (50 U.S.C.A. App., 2d § 305(g)) and the word "religion" in the First Amendment meant a religion related to a belief in God.

Time and later decisions have shown the validity of the views stated in the dissenting opinion in *Berman*, including the following (at pp. 383-4):

> "It is my opinion that Congress would have regarded it by 'religious training and belief' if Abraham Lincoln had never attended any religious service but had so trained his mind from intensive study before the fire in his log cabin of the Bible, Aesop's Fables, and Pilgrim's Progress, that he acquired a religious belief. Nor that it was not religious if he believed he lived in a world in which men, by a quality of their spirits not controlled by material things—that is in a supernatural world of spiritual beings—owe a moral duty to other men, also morally free, not to destroy the bodies in which their

spirits are enfleshed. In my opinion, Congress did not think it necessary for his religious training and belief that Lincoln should have trained himself or have been trained by concentration of his mind on the discourse of a clergyman in the course of attendance of services of the protestant church of which he became a member.

• • •

"It is true that there is no evidence that Berman's religious conviction that he should not kill his fellow man flowed from the command of some god or gods of one or another of the world's many religious congregations, and we may assume that such was not its source. But many of the great religious faiths with hundreds of millions of followers have no god.

• • •

"This recognition of religion as not requiring a god is excellently stated in Judge Augustus Hand's opinion in United States *v.* Kauten, 2 Cir., 133 F. 2d 703, 708.

"Even the dictionary definitions recognize that religion need have no god.

• • •

"Here we have Berman's uncontradicted statement that his 'conscientious' objection is the result of his religious belief. 'Conscience' is not derived from a materialistic concept of the origin of human beings.

• • •

"The power of conscience postulates a supernatural spirit. Only by the spirit's superiority and control over the demands of surrounding nature, can man be conscientious. Only by supernatural power does man's *will* overcome his animal desire to kill or destroy."

The commentary in Vol. 51 The Georgetown Law Journal, 252 quoted above, at page 24 states that the line of reasoning followed by Judge Hand in ***Kauten*** had been

adopted by this Court as the current interpretation of the meaning of the word religion in the First Amendment.

As the Court of Appeals herein said (R. 36), "the decision in *Kauten* was the precursor of *Torcaso*", for in *Kauten's* broad definition was embraced the recognition that "religion" could not be confined to a belief in a "supernatural power"; and that for many in "today's skeptical generation" the "stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God".

The Government contended below that the *Kauten, Downer* and *Badt* cases are not applicable because the 1940 Act was amended in 1948 by inserting the "Supreme Being" provision. The difficulty with that position is that Congress, by that very amendment, violated the First Amendment under the above-quoted decisions of the United States Supreme Court, especially the *Torcaso, Engel* and *Schempp* cases.

Two recent cases noted above, in which are collected judicial definitions of religion, are particularly relevant here. Both cases involved exemption benefits.

In *Fellowship of Humanity* v. *County of Alameda*, 315 P. 2d 394 (1957), the California appellate court held that a Humanist organization was entitled to have its property exempt from taxes on the ground that it was a religious organization. The California Constitution exempted from real property taxation buildings "used solely and exclusively for religious worship". The basic question, the Court said, was this: "Is a belief in God or gods essential to 'religious worship', as those terms are used in the state Constitution?" A belief in and reverence of God was not essential to membership in the Humanist group seeking the exemption.

After reviewing many judicial, dictionary and expert definitions of religion, the Court stated, in part:

> "Suffice it to say that many authorities in the field include nontheistic beliefs among the world's recognized religions."

The Court concluded:

> "Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief. The content of the belief is of no moment."

To the same effect see *Washington Ethical Society* v. *District of Columbia,* 249 F. 2d 127 (1957) where it was held by the United States Court of Appeals for the District of Columbia Circuit that a Washington ethical cultural society, the members of which were not required to believe in a Supreme Being or supernatural power, was entitled to tax exemption under the Washington, D. C. Code, enacted by Congress, which exempted from certain taxes churches and other buildings used for "religious" services and for "religious worship". The exemption had been denied on the ground that this group did not use its buildings for "religious worship", since "religious" and "worship" require a belief in, and teaching of, a Supreme Being. The Court stated (at p. 129)

> "Reference to standard sources of definitions discloses that the terms 'religion' and 'religious' in ordinary usage are not rigid concepts. Indeed, the definitions in these standard works taken together are by no means free from ambiguity. Some definitions would include only the Christian religion. Some call for belief in and worship of a divine ruling power or recognition of a supernatural power controlling man's destiny. But also included in these definitions is the idea of 'devotion to some

principle; strict fidelity or faithfulness; conscientiousness, pious affecting or attachment.'"

* * * * *

"To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues."

There are many kinds and definitions of religion.

A religion defined in terms of a belief in "*a* Supreme Being", is not only theistic but also monotheistic. There are other religions that are polytheistic, pantheistic, spiritualistic, animistic, and naturalistic; and still others that are nontheistic, as Buddhism, Confucianism, Taoism, Ethical Culture and Humanism.

This case, unlike *Peter* and *Jakobson*, does not concern, primarily, questions of theology as to the nature of this "Supreme Being" or "one God", or as to the permissible concept thereof under this statute, but it does concern a concept or definition of "religion" involving conscience which is different from "a Supreme Being" definition.

There is no need here to explore or expound the subject in depth. In his Selective Service file, Seeger set forth some definitions and concepts of religion, by Einstein, Whitehead, Kant, Eddington, Hillel and Harkness, which seemingly are reflections of his ideas (R. 113). In a footnote are listed a bare sampling of the many books that deal with this subject.*

* *William James*, "The Varieties of Religious Experience" (1929) Longmans, Green & Co.; *Archer*, "Faiths Men Live By" (1958) Ronald Press; *Ducasse*, "A Philosophical Scrutiny of Religion" (1953) Ronald Press; *Friess and Schneider*, "Religion in Various Cultures" (1932) Holt; *Huston Smith*, "The Religions of Man" (1958) Harper; *John B. Noss*, "Man's Religions" (1949) Macmillan; *Homer W. Smith*, "Man and His Gods" (1952) Little Brown & Co.; *William E. Hocking*, "Living Religions and a World Faith" (1939); *E. O. James*, "The Ancient Gods" (1960) Putnam; *Carl H. Voss*, "The Universal God" (1953) Beacon. *Andrew D. White*, "Warfare of Science with Theology in Christendom" (1896) Macmillan; Frazier, "The Worship of Nature" (1926) Macmillan; Everett, "Religion in Human Experience" (1950) Holt; Rosten, "Religions of America" (1955) Simon & Schuster.

As William James said in his book, there are systems of religion "which do not positively assume a God", and he noted several (at p. 51).

In Professor Ducasse's excellent work, are chapters on the features, nature and concepts of various religions, on "definitions of religion" and on "A nontheistic major religion: Buddhism". He states (at p. 20) that his notes include "some seventy-five" definitions of religion and that J. H. Leuba in his well-known work, "A Psychological Study of Religion" lists forty-eight definitions of religion. He points out that some religions exist in which worship of, or even a belief in, a deity, has no part; and mentions, among others, Buddhism, Jainism, Confucianism, Comte's Religion of Humanity and Contemporary Humanism. In a section on "Theistic and Nontheistic" (at p. 57) he says:

> "Moreover, the use of such terms as God or gods, divinity, deity, divine, theism, bring with it the necessity—too seldom explicitly satisfied—of specifying what marks off spiritual beings or agencies that are "gods", or if impersonal nevertheless "divine", from spirits that are not gods and yet are not the ghosts of the dead."

Then, too, there are the contemporary theologies, typified by Tillich's "Systematic Theology", some of which are mentioned in the recent book by Bishop Robinson, "Honest to God" (1963), wherein are discussed such subjects as "The End of Theism?" and "The Ground of our Being", and in which the very idea of considering God in terms of a "being" is questioned.

A standard definition of "Supreme Being" is that found in the American College Dictionary: "the sovereign of the universe; God".

The universe has expanded immeasurably since Galileo and since most of the world's religious scriptures were written, and is still expanding.

It is difficult to conceive, today, of a "sovereign" of the universe now known to astronomers through modern

astronomy. This immense and seemingly infinite universe is portrayed in recent books on astronomy, such as *Shapley's* "Of Stars and Men" (1958) and *Hoyle's* "The Nature of the Universe" (1950). As they point out, the earth and the solar system are insignificant parts of the tremendous milky way galaxy. This, in turn, says Hoyle, is only one of 100,000,000 galaxies within range of observation, continuing out to a distance of 1,000,000,000 light years, each of which contains, on the average, more than 1,000,000 planetary systems and is about 1,000,000 light years away from any other. Shapley says there are billions of planetary systems in the known universe and at least one million billion high-life planets capable of supporting organic life and the evidence is ever increasing for vast numbers of habitable planets.

Despite all of this, an 18 year old draftee is expected and required to answer, categorically, the awesome question, "Do you believe in a Supreme Being?", if he desires exemption as a conscientious objector. If he hesitates, or expresses the least doubt, he cannot hope, under the law, to be exempted from military service, even though he has a sincere conscientious belief, religious or otherwise, that war is morally wrong.

Surely the Founding Fathers did not intend that the concept of "religion" as used in the Constitution, should be so circumscribed by Congress.

POINT V

No prior federal draft act has contained such a "Supreme Being" provision or drawn a line between religions related to a positive belief in a "Supreme Being" and religions not so related.

The Government's brief (pp. 41-72) reviews prior colonial state and federal draft acts to the end of trying to justify, constitutionally, the "Supreme Being" classifi-

cation in the present Act. Its thesis seems to have been adopted from a law journal article, in which such prior acts are reviewed, written in 1952 before the decisions of this Court in *Torcaso* and other ruling cases. See *Russell*, "Development of Conscientious Objector Recognition in the United States", 20 Geo. Wash. L. Rev. 409 (1952).

The early colonial and state draft acts are interesting historically, but of little or no present constitutional significance. For instance, it is especially interesting that probably the first draft law in this country which provided an exemption for conscientious objectors, was enacted by the colonial government of the "religious freedom" Colony of Rhode Island in 1673, and provided an exemption for the person whose conscience would not permit the bearing of arms and was not limited to those whose objections were based on religious concepts. *Russell, supra*, at pp. 412-3; Rhode Island Act of August 13, 1673; Selective Service System, Vol. II, Backgrounds of Selective Service, Part 12, at pp. 15-16. It provided:

> "Bee it therefore enacted, * * * that noe person nor persons (within this Collony), that is or hereafter shall be persuaded in his, their conscience or consciences (and by him or them declared), that he nor they cannot nor ought not to trayne, to learne to fight, nor to war, nor kill any person or persons.
>
> "That neither he nor they shall at any time be compelled against his or their judgment and conscience to trayne, arm or fight, to kill any person nor persons by reason of, or at the command of any officer of this Collony, civill nor military, * * * nor shall suffer any punishment, fine, distraint, pennalty nor imprisonment, who cannot in conscience trayne, fight, nor kill any person nor persons for the aforesaid reasons expressed * * *" (as in original)

Briefly summarized, the colonial experience was essentially this: Some few colonies, during colonial times, provided for conscientious objection exemption without a

religious basis; most of the colonial draft acts allowed exemptions to those persons whose conscientious objections were based on religious scruples; but none of them prescribed a "Supreme Being" test or criteria to such "religions". In these acts, "conscience", frequently, is equated with "religion".

The Framers of the Federal Constitution, it can be assumed, were familiar with these colonial laws.

Turning to the "Federal" level, on July 18, 1775, just prior to the American Revolution, the Continental Congress passed a resolution stating:

> "As there are some, people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences * * *." (*Russell, supra,* at p. 414; 2 J. Cont. 189 (July 18, 1775), Library of Congress 1905.)

Here, again, conscience and religious principles are equated and are not limited or related to a belief in a "Supreme Being".

In the first session of Congress, Madison introduced into the House of Representatives the original draft of the Bill of Rights Amendment to the Constitution, which provided in part:

> "The civil rights of none shall be abridged on account of religious belief or worship * * * nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed * * *.
>
> "The right of the people to keep and bear arms shall not be infringed; * * * but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." (*Russell, supra,* pp. 414-5; 1 Annals of Congress 434 (1789).)

The first clause was passed by the House, as amended, to read:

> "That Congress shall make no law establishing religion or to prevent the free exercise thereof, or to infringe the rights of conscience."

As for the second clause, efforts to limit the persons exempted to those belonging to a religious sect failed and it was adopted by the House. (See *Russell, supra,* pp. 416-7; 1 Annals of Congress (1789) at pp. 434, 435, 730, 749-51, 767.)

Eventually, as the result of conferences with the Senate, the first clause was revised and the second clause for the exemption of religious objectors was eliminated, and the religious clauses of the First Amendment were adopted in their present form.

The "speculations" in the Government's brief (at pp. 47-9) as to the reasons for these changes are not documented. However, this much does seem clear—that there was substantial sentiment for making exemption for a conscientious objector an express constitutional right; and that there was no intention whatever to limit or define "religion" for such exemption purpose or for any other purpose, merely in terms of a belief in a "Supreme Being".

It also seems very likely that the Framers assumed that the rights of conscience were fully protected by, and embodied in, those religion clauses. Cf. *Freeman,* "A Remonstrance for Conscience", 106 U. of Pa. L. Rev. 806, 808-13 (1958).

From the Revolution until the Civil War, Congress consistently refused to enact a federal draft act. *Russell, supra,* pp. 417-8; Selective Service System, 1 Backgrounds of Selective Service 61 (Special Monograph 1947).

The Government refers (Gov. Br. p. 48) to a bill introduced in Congress during the War of 1812 (fortunately never passed) which would have granted exemption to a conscientious objector provided he was "a member of any religious sect or denomination of Christians".

Obviously, such a "Christian" law would have been as unconstitutional as is the present "Supreme Being" law.

In 1863, during the Civil War, the first federal draft law was passed and therein exemptions were allowed only by

providing a substitute or by paying money. 12 Stat. 731, 733 (1863).

Under the 1863 Draft Act, as amended in 1864, exemption from combatant service was accorded to "members of religious denominations * * * conscientiously opposed to the bearing of arms, and * * * prohibited from doing so by the rules and articles of faith and practice of said religious denominations." Exempted persons could either do non-combatant service or pay $300. This Act contained no "Supreme Being" provision. (13 Stat. 9 (1864); *Russell, supra,* 418-19.)

The constitutionality of this Act was not tested; but under recent decisions of this Court such a law, granting exemption only to "members of religious denominations" would seem unconstitutional.

The Militia Act of January 21, 1903 exempted persons whose "religious creed" forbade participation in war (32 Stat. 775 (1903)); and the National Defense Act of June 2, 1916 (39 Stat. 197 (1916)) exempted persons who because of "religious belief" claimed exemption from military service. (*Russell, supra,* p. 420 footnote.)

The next federal draft act was the Selective Draft Act of 1917 (40 Stat. 76 (1917)). Thereunder, exemption from service in the armed forces was provided for "a member of any well-recognized religious sect or organization * * * whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organization * * *."

This act contained no "Supreme Being" provision.

This act was held not to violate the First Amendment in the Selective Draft Law Cases, 245 U. S. 366 (1918) but the point was barely mentioned and not discussed. Under recent decisions of this Court, it undoubtedly would have been declared unconstitutional, in restricting exemption to "members of any well-organized religious sect or

organization". *Kurland*, "Religion and the Law", 1961, at pp. 37-8; cf. Jackson, J., dissenting in *Zorach* v. *Clausen*, *supra*, at p. 325.

The 1940 Draft Act, as noted above, granted exemption to conscientious objectors by reason of "religious training and belief". Again, there was no requirement of a belief in a Supreme Being.

This was the Act that was construed and applied by the Second Circuit Court of Appeals in the *Kauten*, *Downer* and *Badt* cases, *supra*, and it was held therein that the provision "religious training and belief" was not limited to a belief in a deity, but also covered "religion" as broadly defined therein.

The Ninth Circuit Court of Appeals in *Berman*, *supra*, by a divided court, reached a different conclusion and held that "religious training and belief", in this connection, meant a "belief in a relation to God involving duties superior to those arising from any human relation". This concept, obviously, was derived from the sentence taken from the minority opinion written by Justice Hughes in the *Macintosh* case, *supra*.

In inserting the "Supreme Being" provision in the Selective Service Act of 1948, it would appear that Congress followed the *Berman* opinion. (Sen. Rep. No. 1268, 80 Cong., 2nd Sess. (1948).)

This was the first time that any federal draft act had contained such a "Supreme Being" provision or had drawn a distinction between religions based on a "Supreme Being" belief and other religions. Thus, there is *no* historical basis for such a classification in the prior federal draft acts.*

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* In its brief in *Jacobson* (No. 51, this term) the Government admits this (at pp. 18, 20):

> "In the long history of exemptions from military service for conscientious objectors in the United States, we know of no indication of any attempt by Congress to distinguish between or among religious beliefs. * * *

POINT VI

The decisions of U. S. Courts of Appeal, cited in the Government's brief, which have upheld the constitutionality of the "Supreme Being" provision of Section 6(j) were erroneously decided in light of existing constitutional doctrines and are otherwise distinguishable.

In its brief (at p. 18), the Government cites various cases which have upheld the constitutionality of the Supreme Being clause of Section 6(j). These include the cases cited by the Department of Justice in its recommendation of non-exemption (R. 9) and by the District Court in convicting respondent (R. 21-2). These cases are as follows: *United States* v. *Bendik*, 220 F. 2d 249 (2 Cir., 1955); *United States* v. *DeLime*, 223 F. 2d 96 (3 Cir., 1955); *Clark* v. *United States*, 236 F. 2d 13 (9 Cir., 1956), cert. den., 352 U. S. 882; *George* v. *United States*, 196 F. 2d 445 (9 Cir., 1952), cert. den., 344 U. S. 843; *Davidson* v. *United States*, 225 F. 2d 836 (9 Cir., 1955), cert den., 350 U. S. 887 (1955); *Etcheverry* v. *United States*, 320 F. 2d 873 (C.A. 9), cert. den., 375 U. S. 930; *Peter* v. *United States*, 324 F. 2d 173 (C.A. 9), pending on writ of certiorari, No. 29, this Term.

All of these cases, except *Etcheverry* and *Peter*, were decided before *Torcaso* v. *Watkins*, 367 U. S. 488 (1961) and before the constitutional infirmity of such a "Supreme Being" provision had been fully articulated by this Court.

It was not until 1961, in *Torcaso*, that this Court first spelled out the principle that Congress could not pass laws or impose requirements which aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. None of the cited cases, not even *Etcheverry* or *Peter* decided after *Torcaso*, considered this constitutional principle.

The cited cases are otherwise distinguishable.

In the *Bendik*, *DeLime* and *Davidson* cases, the registrants' objections were based on a philosophical or political ground rather than on a religious ground, as here, and in the *DeLime* and *Davidson* cases, the courts did not pass on the constitutional question.

In the *George* case, the Court specifically pointed out (at p. 452) that the registrant, having stated he believed in a Supreme Being, was not in a position to question the validity or constitutionality of Section 6(j). In that case, the Court, in quoting dictionary definitions of "Supreme Being" and definitions of "religion" stated: "There is a dispute among students as to what Religion is"; but concluded that the "Supreme Being" definition in this statute "comports with the standard or accepted understanding of the meaning of 'Religion' in American Society".

(Respondent, of course, questions the idea that Congress can establish as "standard" or "accepted" any definition of religion, and more particularly, one related to a Supreme Being belief.)

In the *Clark* case, the registrant was denied exemption because, according to the Court, registrant's conscientious objection was based upon political, sociological or philosophical views and not by reason of religious training and belief. The Court (at pp. 23-24) relied upon and quoted from the *George* case, and, particularly, pointed out that Congress was free, constitutionally, to restrict the definition of religious training and belief and to deny exemption to registrants which Congress does not class as "religious" in the ordinary acceptance of the word. (This conclusion is questioned by respondent.)

The facts of *Etcheverry* are not disclosed in the brief opinion. The Court merely followed, without comment or discussion, its earlier decisions in *Clark* and *George*, without any reference to the *Torcaso* decision or any of the other decisions of this Court interpreting and defining

the meaning of the "Establishment" and "Free Exercise" clauses of the First Amendment.

In *Peter*, the registrant said his belief in a Supreme Being depended on its definition and the immediate issue there is whether or not *Peter's* belief is related to a Supreme Being. The Court relied on its earlier decisions in *Berman* and *George* and Chief Justice Hughes' definition of religion in his dissent in *Macintosh* and, quoting from those earlier cases, said that, • • • "it is far beyond the power of this court to change the definition placed in the act by Congress": and that no matter how devotedly *Peter* adheres to it, "his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute." The Court did not mention *Torcaso* or other related cases.

All of these cases, except *Bendik* and *DeLime*, were decided by the Ninth Circiut Court of Appeals and were predicated upon its decision in *Berman* v. *United States*, 156 F. 2d 377 (9 Cir., 1946), cert. den. 329 U. S. 795 (1946).

More recently, that Court in *MacMurray* v. *United States*, 330 F. 2d 928, 929 (1964), upon basing its decision on other grounds, said it "need not consider the suggestion that our prior decisions upholding the constitutionality of the Act (Etcheverry v. United States, 320 F. 2d 873 (9th Cir. 1963) and cases cited) should be re-examined in the light of the contrary decision in United States v. Seeger, 326 F. 2d 846 (2nd Cir. 1964)."

Respondent contends that the decision of the Court of Appeals herein is entirely correct, in light of *Torcaso* and other cognate decisions of this Court, and that the decisions above upholding the constitutionality of Section 6 (j) were wrongly decided.

POINT VII

The Selective Draft Law Cases are not controlling here.

The Government relies (Gov. Br. pp. 18, 20, 21, 28, 29, 33) upon the *Selective Draft Law Cases*, 245 U. S. 366 (1918).

Those cases, and the companion cases cited by the government (Gov. Br. p. 21), arose under the Selective Draft Law of 1917 which exempted regular or duly ordained ministers of religion, theological students and members of any well-organized and existing religious sect or organization whose creed or principles forbade its members to participate in war in any form (Selective Draft Act of 1917, 40 Stat. 76 (1917)). The Court did not discuss the contention that this law violated the First Amendment. It merely stated, in passing, (at pages 389-90):

> "And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

This case was decided before the later decisions of this Court which have delineated the meaning of the "Free Exercise" and "Establishment" clauses of the First Amendment. In retrospect, and in light of those latter decisions, it seems clear that said exemption provision of the 1917 Selective Draft Act actually was in violation of the First Amendment.

In his recent book "Religion and the Law" (1961), Professor Philip B. Kurland of the University of Chicago states, at pages 37-8, as follows:

> "*The Selective Draft Law Cases* brought to the Court appeals from convictions for evasion of the

draft law. Among the many issues raised by the defendants was the question whether the classification contained in the language quoted from the statute was invalid as a violation of the first amendment separation clause. Mr. Chief Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I, disposed of the issue quickly, but without authority or reason. * * * The decision is as sound as the reasons given for it. The statute did not exempt all whose consciences forbade them to fight. It exempted only those with proper religious allegiances. It may be more difficult for some than it was for Chief Justice White to see why this classification was not a breach in the high wall of separation."

POINT VIII

Additional comments in reply to Government's brief.

The basic arguments advanced in the Government's brief already have been met. Some few additional comments might further clarify the issues.

The Government, throughout its brief, seeks in various ways to justify the classification of religions set up by Congress in Section 6(j). That classification, constitutionally, cannot be justified, in any way.

It has already been noted herein that Seeger is not a "non-religious" objector, as the Government now seeks to identify him in order to undergird its argument designed to justify a classification between "religious" and "non-religious" objectors.

The Government says (Gov. Br. p. 11) that Section 6(j) is "as 'neutral' a measure as could be devised". Actually, it is not "neutral" at all, either as between kinds of religious beliefs or as between religious beliefs and non-religious beliefs.

The Government argues (Gov. Br. pp. 19-33) that Section 6(j) "accommodates" the "free exercise of religion"

to the needs of conscientious objectors whose religion is based on a belief in a "Supreme Being".

This may be so, as noted above, but it does not recognize the "free exercise" of religion claims of nontheistic objectors like Seeger (nor the "free exercise" claims of nonbelievers). This Court has said, in the cases cited in the Government's brief and above, that they too, come within the coverage of the "religion" clauses of the First Amendment. Such a limited "accommodation", is an actual preferment and an invidious discrimination.

The *Sherbert* case did not involve a legislative act which provided an exemption for persons of particular religious views but not for persons of other religious views. The legislation there did not mention religion or any particular religion.

The issue here is not (Gov. Br. p. 33) whether Congress has power "to decide to accommodate persons whose religious convictions forbid participation in war"; but, rather, whether it has power to decide to accommodate *only* those persons whose religious convictions forbid participation in war and, also, include a belief in "a Supreme Being."

The Government (Br. p. 24) argues that the establishment clause "does not require the government to ignore religious beliefs in the framing of legislation dealing for secular purposes with conduct conforming, in some instances, to the dictates of religion"; and that the aim of the exemption "is to alleviate the harshness which would result if individuals were compelled to flout the commands of their religion in order to obey those of the State."

But, here, the point is that the Government in framing legislation for a legitimate secular purpose cannot, either under the "Establishment Clause" or the "Free Exercise Clause" prefer one religious belief over another. To obtain exemption status Seeger would have had to flout the commands of *his* religion. Government cannot penalize persons of one kind of religious belief by denying benefits

available to persons of another kind of religious belief—especially if the distinction is merely between theistic and nontheistic religious beliefs because certainly there can be no suggestion here that the exercise of a belief not based on a Supreme Being involves any criminal conduct or that in this respect, at least, the "Supreme Being" type of belief is superior to the other.

This statute has the purpose and effect to frustrate the free exercise of, and to discriminate invidiously against, nontheistic religions. It is not necessary for Congress in the advance of the secular purposes of the draft law to draw such a distinction, as the Court of Appeals pointed out (R. 37); cf., *Braunfeld, supra,* at p. 607. The Government did not do so in the 1940 Draft Act.

The "Establishment Clause, in the contemplation of the Framers, 'did not limit the constitutional proscription to any particular, dated form of state-supported theological venture'," *Schempp, supra,* Brennan J., concurring, at p. 234.

The Government states (Gov. Br. pp. 41, 71; also in its *Jakobson* brief, pp. 18, 20) that the history of draft laws in this country shows that the scope of exemptions for conscientious objectors "has always been limited to those whose opposition was based upon religious belief" and that therein Congress never attempted to distinguish between or among religious beliefs. Actually, in most of those prior laws, exemption was limited, by name or general description, to members of organized, recognized, pacifist religions.

But, as pointed out above (Point V) in these prior draft laws, particularly in the federal enactments, no distinction was made between religions based on a "Supreme Being" belief and religions based on other beliefs. In this respect, the present draft law is novel. Thus, even historically, such a classification cannot be justified, apart from its unconstitutionality.

The Government argues (Gov. Br. p. 80, 14) that the "Supreme Being" provision of Section 6(j) is justified because, according to the Government, it is "in keeping with the ideals and traditions of the American people", embodies "the understanding of religion shared by the great majority of the American people" and would meet with the approval of "the great bulk of the people affected" and the "consensus". Even assuming the truth of these statements, they present no valid constitutional criteria. Non-traditional, minority and unpopular religions are equally entitled to the protection and benefits of the First Amendment.

The Government, in effect, seeks (Gov. Br. p. 72) to have written into the First Amendment, as the single and authoritative definition of religion", the remark of Chief Justice Hughes in his dissent in the *Macintosh* case, that "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation". To this same end, the Government also invokes the statement, first made by Justice Douglas in *Zorach, supra*, that "We are a religious people whose institutions presuppose a Supreme Being" (Gov. Br. p. 27, 81). The Government fails to point out (as Justice Douglas did in his dissent in *McGowan, supra* (at p. 563)) that his reasons for that statement were:

> "The Puritan influence helped shape our constitutional law and our common law as Dean Pound has said: The Puritan 'put individual conscience and individual judgment in the first place.' The Spirit of the Common Law (1921), p. 42."

Nor, does the Government note that this Court has stated that that statement does not mean "that religion has been so identified with our history and government that religious freedom is not likewise as strongly embedded in our public and private life." *Schempp, supra* (at p. 214).

As pointed out above (p. 41-2), if Congress were to pass a law that "no religious test should even be required as a qualification to any office or public trust under the United States, *other than a declaration of a belief in the existence of a Supreme Being*", such a law, obviously, would be unconstitutional. It would inject a "Supreme Being" belief into the "religious test" provision of Article VI, Clause 3 and would ban all but "Supreme Being" believers from public office. This would resurrect the very situation that the Constitutional provisions were designed to prohibit, because laws like that existed in the Colonies before the Constitution was adopted. See *Torcaso, supra* (at p. 494). And yet, according to the Government's argument, that is precisely what Congress can, and should be permitted by this Court to, do in respect of the "religion" clauses of the First Amendment. That, of course, would violate the principle that Constitutional provisions relating to the same subject should be harmoniously read and construed.

After suggesting that there should be read into the term "religion", as used in the First Amendment, the limited concept of a religion based on a belief in a Supreme Being or one God, the Government proceeds to argue that the classification established by Section 6(j) "includes all 'religious objectors' who are seeking to follow the commands of 'religion' as that term is used in the First Amendment"; and that, in any event, it is "immaterial" whether "the lines drawn by the statute coincide exactly with the meaning of 'religion' in the First Amendment" (Gov. Br. p. 75). Also, it argues (Gov. Br. p. 60) that Section 6(j) "does not discriminate between religions as that term is used in the First Amendment." Nevertheless, it recognizes that "constitutional doubts" arise from granting exemptions to persons holding one religion and not to those holding another (Gov. Br. 73).

It *is* vitally *material,* constitutionally, that Congress, in making laws, shall draw lines which coincide *exactly* with the meaning of the word "religion" as used in the First Amendment. In this statute Congress has not done so, and "constitutional doubts" have arisen precisely for that reason.

The Government says (Gov. Br. pp. 13, 76) that the statutory definition "covers the core of 'religious' objectors in the constitutional sense of religion even if there is argument about the periphery". But the draft authorities ruled that the statute does not cover Seeger's religion. The Constitution draws no line between "core" and "periphery" religions.

Nor does the Constitution draw any line between a religious belief compelled, externally, from an assumed divine command and one that is compelled, internally, from the dictates of conscience (Gov. Br. 75, 76).

The Government (Gov. Br. 66) suggests that "religion" does not include "conscience" and that "conscience" and "religion" cannot be equated for purposes of the First Amendment. Actually, the two terms were equated in colonial constitutions and in the debates in the Constitutional Convention, and are still being so used today. For example, in the New York State Constitution it is provided (Article I, Section 3):

> "Freedom of worship; religious liberty.
>
> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the *liberty of conscience hereby secured* shall . . ." (Italics added.)

Another example is this familiar passage from *Girouard* v. *United States*, 328 U. S. 61, 68 (1946):

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."

Judge Hand was entirely right in observing in *Kauten*, *supra* (at p. 708), that the response of an individual to conscience is a "religious impulse."

There is no indication in the record here, that the present classification operates any more successfully, for example, than the 1940 Draft Act (Gov. Br. pp. 14, 78, 79).*

Although difficulties are inherent in any statute of this kind involving religious beliefs and conscientious objectors, it is hard to understand why it should be any more difficult for the draft authorities to determine whether a registrant is sincere and has or has not a religious belief, than it is to determine whether a registrant is sincere and does or does not believe in an "acceptable" kind of a Supreme Being, witness the *Peter* and *Jakobson* cases. The Court of Appeals points this out (R. 37); and the draft officials had no difficulty ascertaining Seeger's sincerity, without a professed belief by him in a Supreme Being.

In this context, it may be observed that in this sensitive area difficulties do arise, occasionally, in judging the sincerity and truth of a person's conscience or religion or

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* As noted above (p. 34), in Great Britain and a number of other countries, draft acts exempting *all* sincere conscientious objectors have been in effect and apparently have operated successfully.

belief in a Supreme Being. Cf. *United States* v. *Ballard*, 322 U. S. 78 (1944). Because the divine source of his teachings was not recognized or accepted by the prevailing authorities, Jesus was crucified. Because her visions and voices were determined by a council of learned theologians not to have been derived from the true God, Joan of Arc was burned. Because the daemon whose "voice" counselled him was not recognized as being related to the prevailing divinities of Greece, Socrates was condemned to die by poison. From the point of view of the authorities of the times those three cases were probably "successful operations"!

In any event, a "successful operation", from the Government's point of view, is not a valid criteria, constitutionally. Numerous laws which have operated successfully from government's point of view have been stricken down as in conflict with the First Amendment.

Nor, is there any reason why Congress should accord relief only to those whose situation appeals to it "most compelling to the instincts of toleration and compassion" (Gov. Br. p. 80). Every sincere conscientious objector, whatever his religious belief or theology, is entitled, equally, to the Government's toleration and compassion.

Draft exemptions should not be restricted, as in this statute, to conscientious objectors who have, or profess to have, a belief in the "Supreme Being" kind of religious concept. The statute is clearly unconstitutional. To hold the statute to be valid, under the Constitution, would be to restore the historically and constitutionally discredited policy of discriminating against persons because of their belief in some particular kind of religious concept. Cf. *Torcaso, supra,* at p. 494.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals, Second Circuit, should be affirmed, with costs.

Respectfully submitted,

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